IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 19596 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DHRANGADHRA MUNICIPALITY - Petitioner(s)
Versus
GANPATBHAI JETHABHAI MAKWANA - Respondent(s)

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Appearance :
MR BD KARIA for Petitioner(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 07/08/2007

ORAL JUDGMENT

1. Heard learned Advocate Mr. BD Karia for the petitioner.
2. Through this petition under Article 227 of the Constitution of India, the petitioner

Dhrangadhra Municipality has challenged the award of the Labour Court, Surendranagar dated 26.2.2007 in Reference No. 81 of 2000 wherein the labour court has granted reinstatement to the respondent workman without back wages for intervening period.

3. During the course of arguments, learned Advocate Mr. B.D. Karia for the petitioner has submitted that the labour court has committed gross error in not considering the contention raised by the petitioner that the respondent was appointed by back door entry in the service; not completed 240 days continuous service in a year and the respondent was appointed on ad hoc basis and, therefore, labour court ought not to have granted relief of reinstatement to such a workman.

4. I have considered the submissions made by the learned Advocate Mr. Karia on behalf of the petitioner. I have also perused the award made by the labour court. The respondent workman had joined the duties on the post of Mechanic in the Mechanical Branch of the establishment of the petitioner in the year 1997-98 in the duties of a permanent nature and performed duties for a period of more than one year. In the year 1998, petitioner Nagarpalika had posted the respondent on the vacant post of Compost Ground Watchman where the workman had performed duties for a period upto 2000 January and in this manner, though the respondent had performed total duty

of a period of more than three years, yet, upon constitution of the new board in the petitioner Nagarpalika, new rulers terminated the services of the respondent without there being any reason and also giving any notice or notice pay in lieu thereof and though the case of the respondent workman was pending for adjudication before the Tribunal, without obtaining prior permission of the Tribunal, terminated the services of the respondent rendering him unemployed in breach of section 25-F and 33(2)(b) of the ID Act and, therefore, workman was praying before the labour court to grant him reinstatement in service with full back wages for interim period with continuity of service. Respondent was appointed in March, 1997 and remained in continuous service upto November, 1998 and during that period, he completed about 453 days service as per the record of the petitioner.

5. Before the labour court, respondent workman had given application Exh. 12 praying for production of the documents mentioned therein from the custody of the petitioner namely muster rolls from 1996 to January, 2000; Salary Statement and seniority list of the workmen and details of the workmen working on the establishment of the petitioner with their date of joining on which labour court passed order to reply or comply by making production. Two documents were produced by the respondent before the labour court. One is the certificate of passing Motor Mechanic

Examination and the second is the Certificate of Examination. Vide Exh. 16, affidavit was filed by the workman and specific averment was made in the affidavit in para 4 that the petitioner has not given muster card, pay slip, identity card to the respondent and his presence was marked in the muster roll and after signing muster roll, payment was being made to the respondent. Workman was cross examined by the petitioner. Petitioner has produced documentary evidence vide Exh. 19. Result of election of the Nagarpalika for the year 1994, applications made by the respondents and working days of the respondent from 1997 to 2000 and budget for the year 2000 and 2005 have been produced by the petitioner. Chief Officer of the petitioner Nagarpalika Shri Yogesh H. Shah was examined as a witness for the petitioner at Exh. 22 wherein he admitted that the respondent is qualified for the post of Motor Mechanic and lastly he was working as a watchman in the establishment of the petitioner. It was also admitted by him that the muster roll and pay register are being maintained by the petitioner and it is in the custody of the petitioner. Seniority list is also with the petitioner. Work which is being carried out by the respondent is continuing with the petitioner and at present, in all, 340 employees are working with the petitioner. Then the labour court has considered the submissions of both the learned Advocates appearing before

him and after appreciating the evidence on record, labour court came to the conclusion that the workman had completed 240 days continuous service within 12 months preceding the date of termination meaning thereby, from November, 1997 to November, 1998, workman completed 240 days continuous service as per the record of the petitioner. Section 25F of the ID Act, 1947 was not complied with by the petitioner and the labour court has drawn adverse inference against the petitioner because documents in possession of the petitioner as admitted by witness for the petitioner were not produced by the petitioner before the labour court though specific application was made by the respondent workman before the labour court. Ultimately, labour court has come to the conclusion that at the time of terminating services of the respondent, employees junior to the respondent workman were continued in service and after termination of the services of the respondent workman, new fresh workmen were recruited or appointed or engaged by the petitioner and, therefore, according to the labour court, section 25F, G and H of the ID Act, 1947 have been violated by the petitioner and, therefore, based upon such conclusions, labour court granted reinstatement to the respondent workman without back wages for the interim period. Labour court has considered the decision of the apex court in case of RM Yellatti versus Asstt.Executive Engineer,

reported in 2005 (9)SCALE 139 = 2006 (1) SCC 106. Submissions made by the learned Advocate Mr. Karia cannot be accepted for the simple reason that looking to the working days of the respondent workman as per the record of the petitioner, from November, 1997 to November, 1998, respondent workman was completing 240 days continuous service and as such, was entitled for protection of section 25F of the ID Act, 1947. Admittedly, petitioner has not complied with section 25F of the ID Act, 1947 at the time of terminating services of the respondent workman and it is also not the case of the petitioner either before the labour court or before this court that the provisions of the ID Act, 1947 are not applicable to the petitioner establishment. Therefore, in view of non compliance of section 25F, order of termination is bad and void ab initio. Respondent is deemed to be in service for all purposes. Documents which were in custody of the petitioner as admitted by the witness for petitioner were not produced by petitioner before labour court inspite of the request made by the workman and, therefore, labour court was right in drawing adverse inference against the petitioner. Labour court has considered various decisions of this court and other High Court while considering the evidence on record. As regards the submission of the learned Advocate Mr. Karia that as the respondent was not appointed by following due

process of recruitment rules, he was not entitled for reinstatement, such submission cannot be accepted for the simple reason that the dispute was not relating to regularization of the respondent workman but it was as to whether the respondent should be reinstated in service on his original post or not and whether back wages for interim period should be granted to him or not. Therefore, labour court was not deciding the status of workman or issue of regularization of the workman but was considering as to whether the termination of service of respondent workman is legal and valid or not and whether he is entitled for reinstatement or not. Further, learned Advocate Mr. Karia has not been able to point out as to on which basis he is making this submission that merely because of back door entry, section 25F of the ID Act, 1947 is not applicable. He relied upon the apex court decision in case of Jaipur Development Authority Versus Ramsahai and Another reported in (2006) 11 SCC 684. Second decision relied upon by him is State of MP and others v/s. Lalit Kumar Mishra, reported in (2007) 1 SCC 575. Third decision relied upon by him is UP State Road Transport Corporation versus Man Singh reported in (2006) 7 SCC 752.

6. Relying upon the aforesaid decisions, he submitted that if the respondent is not appointed as per the rules, then, he is not entitled for reinstatement.

7. I have considered the said three decisions relied upon by the learned Advocate Mr. Karia. First thing is that mere raising of contention in written statement that the respondent is not appointed according to service rules by the petitioner and, therefore, not entitled for benefit of section 25F of the ID Act, 1947 and reiteration of such contention in affidavit is not enough. For that, petitioner is required to satisfy as to how and why workman is not entitled for benefit of section 25F of the ID Act, 1947. From the entire record, no such submission has been made by the petitioner before the labour court that the respondent was appointed de-hors the rules and, therefore, not entitled for protection of section 25F and also not entitled for the relief of reinstatement. Mere raising of contention in written statement and reiteration thereof in oral evidence and/or written submission is not enough. Pleadings are not evidence and number of contentions are available to the parties but the court is not duty bound to consider each and every contention raised in pleadings or oral evidence. Party must have to plead before the labour court by pointing out specific contention. In absence of such specific contention, it is not the duty of the labour court to consider pleadings raised by the parties. Therefore, if the contentions raised in pleadings not specifically pressed into service afterwards by the party concerned,

then, it would mean that the party concerned has not pressed that contention and has thereby given up the said contention. Labour court has considered the documents on record, oral evidence of the witness for petitioner and considering certain admissions made by the witness for petitioner about custody of certain material documetns, labour court drew adverse inference against the petitioner that the petitioner not produced those documents from its custody because if it would have been produced, then, it would have gone against him.

8. Learned Advocate Mr. Karia submitted before this court that the written submissions were made before the labour court and has also produced copy of those written submissions before this court wherein contention has been raised by the petitioner that the respondent is not selected by the process of selection and, therefore, he has no right of regularization. Thus, petitioner was contending before the labour court that the respondent has no right of regularization as if the labour court was adjudicating dispute relating to regularization of the workman. In entire written submissions made by the petitioner before the labour court, the petitioner has not raised any specific submission that the employee who has been appointed de hors the rules is not entitled for protection of section 25F of the IF Act, 1947. Therefore, labour court was right in not

examining other issues which are not of much relevance because ID Act, 1947 was applicable to petitioner and that aspect was not disputed by the petitioner either before the labour court or even before this court. Further, if the petitioner was contending that as the respondent is not recruited in accordance with the recruitment rules, therefore, not entitled for reinstatement, then, order of reference itself should have been challenged by the petitioner on that ground but that has not been done by the petitoner. No application was tendered by the petitioner before the labour court for deciding that issue as a preliminary issue. Therefore, ID Act, 1947 was applicable to the petitioner, workman was completing more than 240 days ocntinuous service from November, 1997 to Nvember, 1998 and at the time of terminating services of workman, admittedly section 25 F was not followed by the petitioner and, therefore, labour court was right in granting reinstatement to the respondent workman.

9. As regards the decision of the apex court in Jaipur Development Authority (supra), the apex court has considered that in case when recruitment and termination are uncertain or when the workmen are not required to be recruited in category wise service, skilled or semi skilled or unskilled, employer may retrench the workman according to the procedure laid down under section 25G read with section 25B and 25H

of the ID Act, 1947. Apex court has considered that in case of irregular appointment of daily wager on seasonal work, reinstatement not justified because there is nothing to show that when service was terminated, any person junior to him had been retained in service or not.

10. Therefore, facts of the cited decision are not applicable to the facts of the case before hand because in the case before hand, at the time of termination of services of the respondent workman, workmen junior to the respondent workman were retained in service and further, petitioner has not come out with a plea that the work which was being done by the respondent workman herein was seasonal in nature. Respondent was appointed as Mechanic in the Mechanical Branch of the respondent establishment which work cannot be considered to be seasonal in nature and it is not even case of the petitioner. Therefore, said decision is not applicable to the facts of the case before hand.

11. Decision in case of State of MP and others v/s. Lalit Kumar Mishra, reported in (2007) 1 SCC 575 relied upon by learned Advocate Mr. BD Karia is also not applicable to the facts of the present case. The respondent therein filed an application before the labour court for his classification in permanent category of workmen which is not the case before hand. In the said decision, continuous work for more than six months has been held to be not sufficient to

entitle the workman for a status of permanent employee. Here, in the case before hand, there is no question of permanency or permanent status of the respondent workman. In the case before hand, respondent workman was claiming that the termination of his service is illegal and void ab initio in view of non compliance of section 25F, G and H and the award of the labour court is also based upon the findings to that effect wherein labour court has directed to reinstate him on his original post which he was holding prior to his termination and therefore, considering the claim of the respondent workman before the labour court and also considering the relief of reinstatement on original post alone without back wages for interim period granted by the labour court and no relief of permanency or regularizaiton was sought and/or granted by labour court, said decision is not applicable to the facts of the present case.

12. As regards the decision in case of UPSRTC v/s. Man Singh (2006) 7 SCC 752, the respondent workman therein was appointed w.e.f. 20.4.1974 on temporary basis and his services were terminated on 23.7.1975. Respondent therein raised industrial dispute on or about 14.9.86 after about 11 years which was referred to for adjudication to the Labour Court, UP, Agra. Based upon the finding that the termination is violative of section 25F of the ID Act, 1947, labour court therein granted reinstatement with

back wages only from 1986 and High Court in the writ petition filed by UPSRTC refused and thereafter the matter reached before the apex court. The apex court observed that there was no material to show that the employment was in accordance with rules or that the vacancy was regular or that the filling up of the vacancy satisfied the constitutional requirements under Article 14 and 16It was also held in the said decision that besides the unlikelihood of the temporary employee having remained unemployed for such a long time, a very long period of over 30 years having elapsed, held, it would be wholly unjust to direct reinstatement. In such peculiar facts and circumstances of the case, instead of reinstatement with partial back wages, the Corporation was directed to pay Rs.50,000.00 to him. Termination was held to be violative of section 25F of the ID Act, 1947. Thus, even in case of an employee not recruited as per the recruitment, apex court gave finding that the termination was violative of section 25F of the ID Act and in the peculiar facts of that case, i.e. Long passage of 30 years from the date of termination, instead of reinstatement, in lieu of reinstatement, amount of Rs.50000.00 was ordered to be paid to the workman by the Corporation therein and in the case before hand also, termination of the workman is violative of section 25F of the ID Act, 1947 and those peculiar circumstances are

not there in the case before hand and, therefore, that decision is not helpful to the petitioner. Therefore, all the three decisions cited by the learned Advocate Mr. Karia are not helpful to the petitioner. Except said three decisions, no other decision was cited by him before this court and no other submission except those recorded hereinabove were made by Mr. Karia before this Court.

13. This issue was examined by the apex court in case of RM Yellatti versus Asstt.Executive Engineer, reported in 2005 (9)SCALE 139 = 2006 (1) SCC 106. It has been observed by the apex court in par 17, 18 and 19 as under:

> “17. Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workmen stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter

of appointment or termination, if any, the wage register, the attendance ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non production of muster rolls per se without any plea of suppression by the claimant workmen will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down basic principle, namely, that the High Court under Art. 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case.

18. Now applying the above decision to the facts of the present case, we find that the workman herein had stepped in the witness box. He had called upon the management to produce the nominal muster rolls for the period commencing from 22/11/1988 to 20/6/1994. This period is the period borne out the certificate (Ex. W1) issued by the former Asstt. Executive Engineer the evidence in rebuttal from the side of the management produce five nominal muster rolls (NMRs), out of which 3 NMRs, Ex.M1, Ex.M2 and Ex.M3, did not even relate to the concerned period. The relevant NMRs produced by the management were Ex. M4 and Ex. M5, which indicated that the workmen had worked for 43 days during the period 21/1/1994 to 20/2/1994 respectively.

There is no explanation from the side of the management as to why for the remaining period the nominal muster rolls were not produced. The labour Court has rightly held that there is nothing to disbelieve the certificate (Ex.W1). The High Court in its impugned judgment has not given reasons for discarding the said certificate. In the circumstance, we are of the view that the Division Bench of the High Court ought not to have interfered with the concurrent findings of fact recorded by the Labour Court and confirmed by the learned Single Judge vide order dated 7/6/2000 in writ petition No. 17636 of 2000. This is not, therefore, a case where the allegations of the workmen are founded merely on an affidavit. He has produced cogent evidence in support of his case. The workmen was working in SD 1, Athani and Ex. W1 was issued by the former Asstt. Executive Engineer, Hipparagi Dam Construction Division No. 1, Athani-591304. In the present case, the defence of the management was that although Ex. W1 refers to the period 22/11/1988 to 20/6/1994, the workmen had not worked as a daily wager on all days during that period. If so, the management was duty bound to produce before the Labour Court the nominal muster rolls for the relevant period, particularly when it was summoned to do so. We are not placing this judgment on the shifting of the burden. We are not placing this case on drawing of adverse inference. In the present case, we are of the view that the workmen had stepped in the witness box and his case that he had worked for 240 days in a given year was supported by the certificate (Ex.W1). In the circumstances, the Division Bench of the High Court had erred in interfering

with the concurrent findings of fact.

> 19. Before concluding, we would like to make an observation with regard to cases concerning retrenchment/termination of services of daily waged earner, particularly those who are appointed to work in Government departments. Daily waged earners are not regular employees. They are not given letters of appointments. They are not given letters of terminations. They are not given any written document which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases, where registers are maintained by the Government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities. In such cases, we are of the view that the State Governments should take steps to maintain proper record of the services rendered by the daily wagers; that these records should be signed by the competent designated officers and that at the time of termination, the concerned designated officers should give certificates of the number of days which the labourer/daily wager has worked. This system will obviate litigations and pecuniary liability for the Government."

14. Recently, on 8th March, 2007, apex court has considered same issue in case of M/s. Sriram

Industrial Enterprises Ltd. Versus Mahak Singh & Ors. reported in 2007 (3) Supreme Today page 553. In the said decision, the apex court has considered the decision in case of Range Forest Officer v. ST Hadimani reported in (2002) 3 SCC 25 and other all relevant decisions including the decision in case of Surendranagar District Panchayat versus Dahyabhai Amarsinh (2005) 8 SCC 750. In the said decision, the apex court has also considered the earlier three Judges decision of the apex court in case of RM Yellatty v. Assistant Executive Engineer (2006) 1 SCC 106. Ultimately, after considering all relevant decisions in respect of onus of proof, whom to prove 240 days continuous service and how to discharge such burden by the workman and presumption of non production of documents by the employer. Relevant observations made by the apex court in para 23 and 34 of the said decision are reproduced as under:

> “23. Regarding Mr. Desai's submission that this Court had consistently laid down that it is for the workmen to prove that they had worked for 240 days in a calendar year, Mr. Viswanathan submitted that this Court had in the case of R.M.Yellatty vs Assistant Executive Engineer, reported in (2006) 1 SCC 106, observed as

under:

> Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the afore stated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workmen stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non production of muster rolls per se without any plea of suppression by the claimant workmen will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down basic principle, namely, that the High Court under Art. 226 of the

Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case.'

34. Having correctly interpreted the provisions of Section 6N of the UP Act, the High Court rightly drew an adverse presumption for non-production of the Attendance Registers and the Muster Rolls for the years 1991 onwards. The best evidence having been withheld, the High Court was entitled to draw such adverse inference. The views expressed by this Court on the question of burden of proof in case of range Forest Officer's case (supra) were watered down by the subsequent decision in R.M. Yellatty's case (supra)and in our view the workman had discharged their initial onus by production of the documents in their possession.“

15. Therefore, in view of the aforesaid observations made by the apex court recently in case of Sriram Industries (supra), view taken by the labour court is perfectly justified. When the termination is found to be bad, then, natural result thereof is reinstatement in normal circumstances. In the cases cited by learned Advocate Mr. Karia, the apex court has considered the question of irregular or illegal appointment as to

whether such irregularly appointees are entitled for the relief of regularization or not. In the case before hand, petitioner was not seekign relief of regularization before the labour court and that relief was not granted by the labour court but labour court based on the finding that the termination is violative of section 25F,G and H, granted reinstatement alone.

16. Second question is section 25-G and 25-H, whether applicable in case when section 25F has not been violated or when workman has not completed 240 days continuous service, then whether section 25G and 25H would apply or not. Of course, this question is not relevant in view of the facts of the present case before hand because in this case, labour court has given clear finding that there has been violation of section 25F of the ID Act and labour court has also held that the workmen concerned have completed 240 days continuous service. However, this case has been examined by this court that section 25G and 25H of the ID Act, 1947 are independent and distinct sections and for claiming benefit thereof, it is not necessary for the workman to contend and prove that there has been breach of section 25F of the ID Act, 1947. Moment, termination of workman is covered by the definition of 'retrenchment' under section 2(oo), then, irrespective of

the fact whether he has been completing 240 days continuous service or not, court can independently examine as to whether section 25G and 25H are followed by the employer or not as decided by this court (Coram : Hon'ble Mr. Justice MR Shah,J.) in SCA No. 6262 of 2005 with SCA No. 12616 of 2005 dated 25th July, 2005. In said matter, this court has observed as under in para 12, 13, 14 and 15:

> “12. The Labour Court on appreciation of the evidence and considering the fact that the workman has worked only for 3 days in the year 1983 and for 69 days in all in the year 1984-85 as Daily Wager, has held that as the workman has not completed 240 days in the preceding year of retrenchment, there is no breach of Section-25-F of the Industrial Disputes Act. However, considering the fact that new employees came to be appointed on 19.12.1995, the Labour Court has on appreciation of evidence held that there is breach of Section-25-G of the I.D.Act by not calling upon the workman for reemployment. This is finding of fact arrived at by the Labour Court on appreciation of evidence which is not required to be interfered by this Court in exercise of the powers under Articles

226 and 227 of the Constitution of India. Under the circumstances, finding given by the Labour Court that there is breach of Section-25-G of the I.D.Act, in my opinion, is not required to be disturbed and the same is not disturbed and is accordingly confirmed.

12. The next question is with regard to the contention raised on behalf of the management relying upon the judgment of the Division Bench of this Court in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD, 2003 (3) GLR 2590 that for attracting and applicability of Section-25-G and 25-H of the I.D.Act, retrenchment covered by Section-25-F is must, is required to be considered by this Court. Firstly, it is required to be noted that in the said case, the said controversy was not directly involved and on facts, it was found that there was no retrenchment by the employer at all and the Division Bench was considering the same and has made the passing observations which reads as under :

"Apart from that, the attractability or the applicability of Sections-25-G and 25-H would be dependent on the emergence and existence of the condition precedent of retrenchment."

The aforesaid observation seems to be concerning the facts of that case where it was found that there was no retrenchment at all by the employer. Therefore, contention of Shri Clerk, learned advocate for the management corporation that for applicability and attractability of Sections-25-G and 25-H, retrenchment covered by Section-25-F is must, is not correct and cannot be accepted. Even otherwise, as held by the Hon'ble Supreme Court of India in case of CENTRAL BANK OF INDIA (Supra), benefit of Section-25-H would not be confined to the category of the retrenched workmen covered by Section-25-F alone who have been in continuous service for not less than one year. It appears from the judgment and order passed by the Division Bench of this Court relied upon by Shri A.K.Clerk, learned advocate appearing on behalf of the management corporation, attention of the Division Bench was not drawn to the decision of the Hon'ble Supreme Court in case of CENTRAL BANK OF INDIA (Supra) and the Division Bench has not considered the said binding decision.

14. At this stage, the judgment of the Hon'ble Supreme Court in the case of GOVT

OF A.P. V. B. SATYANARAYANA RAO, reported in (2000) 4 SCC 262 is required to be considered. While considering the rule of per incurim, the Hon'ble Supreme Court in the said decision in para-8 has held as under :

"The rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue."

15. There is one another decision of this Court also in case of BHARAT INDUSTRIES V. KHEMIBEN VALJIBHAI AND OTHERS, 1995(1) GLH (UJ) 6 where also, similar view is taken with regard to applicability of Section-25-G and 25-H to those employees irrespective of completion of 240 days and / or retrenchment as envisaged under Section-25-F of the I.D.Act. Considering the fact that the Division Bench of this Court in cited decision of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD, 2003 (3) GLR 2590 has not considered the decision of the Hon'ble Supreme Court in case of CENTRAL BANK OF INDIA (Supra) which is a superior court judgment, assuming that the same meaning is to be given to the judgment of the Division

Bench in case of STATE OF GUJARAT V. RAMESH MOPABHAI RATHOD as suggested on behalf of the management, in that case also, considering the judgment of the Hon'ble Supreme Court, the same is not required to be considered treating it as per incuriam."

17. Thus, even if the workman has not been completing 240 days in a year preceding the date of termination and his services are terminated, then, naturally employer would not be obliged to comply with section 25F of the ID Act, 1947 but if while terminating his services, persons junior to him are retained in service or subsequently fresh workmen are recruited by the employer for the same job which the workman was performing, then, in section 25G and H would be attracted and non compliance thereof would render such termination void, as per the aforesaid decision of this court.

18. In case of Rattan Singh versus Union of India and another reported in (1997) 11 SCC 396, it was held by the apex court that section 25F is applicable to termination of even a daily rated workman who had continuously served for the requisite statutory minimum period in a year. In para 3 of the said decision, it was held as under:

"3. We find merit in the said submission of Shri Ashri. From the dates mentioned in the judgment

of the first appellate court dated 22.1.1985, it appears that the appellant had continuously worked for more than 240 days in a year. Since he was a workman, he was entitled to the protection of section 25F of the Act and the said protection cold not be denied to him on the ground that he was a daily rated worker. It is not the case of the respondents that the provisions of section 25F of the Act were complied with while terminating the services of the appellant. In these circumstances, the termination of services of the appellant cannot be upheld and has to be set aside. The services of the appellant were terminated in th e year 1976. Nearly 20 years have elapsed since then. In these circumstances, we are not inclined to direct reinstatement of the appellant but having regard to the facts and circumstances of the case, we direct that a consolidated sum of Rs.25000 be paid to the appellant in lieu of reinstatement for back wages as reinstatement. This amount is being paid in full and final settlement of all the claims of the appellant. The said amount shall be paid within two months. The appeal is disposed of accordingly. No costs.“

19. In State of Punjab v. Anil Kumar, reported in JT 2007 (7) SC 559, the apex court observed as under in para 3.4 to 9 of the judgment:

“3.4 A demand notice under the provisions of the

Industrial Disputes Act, 1947 (in short the “Act”) was served on the appellant on 29.9.1998 by the respondent. The matter was referred to the Labour Court, Jalandhar, for adjudication under the Act. Appellant iled written statement raising preliminary objections that (a) reference was bad being belated, (b) the discontinuance was justified and © the appellant has already availed the opportunity in the civil court. The labour court Jalandhar passed an award directing reinstatement with 40% back wages from the date of demand notice i.e. With effect from 29.9.1998. A writ petition i.e. CWP NO. 4748 of 2005 was filed by the respondent for the direction to the present appellant to implement the Award dated 12.11.2003. He joined duties on 1.4.2005.

3.5 The appellant also filed a Writ petition before the High Court which was numbered as Civil Writ Petition NO. 6927 of 2005.

3.6 The High Court dismissed the writ petition filed by the appellant. The High Court noted that the workman had worked for more than 240 days of service before his services were terminated and accordingly the award of the Labour Court did not warrant any interference.

4. In support of the appeal, learned counsel for the appellant submitted that the civil suit filed was thoroughly misconceived. In view of section 2(oo)(bb) of the Act on expiry of the

fixed period for which engagement was done, there was no scope for any direction for reinstatement. The demand for reference under the Act was made after 13 years.

5. Learned counsel for the respondent on the other hand submitted that there was a clear submission before the labour court that the respondent had worked for more than 240 days.

6. In view of the factual position as highlighted above, We do not find any infirmity in the order passed by the Labour Court as affirmed by the High Court so far as entitlement of the respondent workman to be reinstated.

7. At the same time, the fact that there was belated approach cannot be lost sight of. Admittedly, there was belated approach and the Labour Court was moved after 13 years.

8. In the peculiar circumstances of the case while upholding the direction for reinstatement, we direct that the directions given by the labour court as affirmed by the High Court regarding payment of back wages need to be modified.

9. In the aforesaid back ground, the direction for payment of back wages stands set aside while the direction for reinstatement is confirmed. “

20. In view of the aforesaid back ground, considering the award made by the labour court, relief granted by the labour court and the

reasoning given by the labour court for granting such relief along with the affidavit of the Chief Officer of the petitioner Nagarpalika as well as the written submissions of the petitioner, labour court is perfectly justified in passing the award in question and decided it in accordance with law and labour court was right in holding that when section 25F is violated, then order of termination of a workman becomes void, ab initio and the workman is deemed to be in service for all purposes. While deciding the reference, labour court has not committed any error apparent on the face of record. Therefore, award made by the labour court does not call for any interference of this court in exercise of the powers under Article 227 of the Constitution of India. Learned Advocate Mr. Karia has not been able to point out any jurisdictional error or legal infirmity in the award. This court is having limited jurisdiction while exercising powers under Article 227 of the Constitution of India. This Court cannot exercise powers similar to the appellate authority. Even in case when two views are possible, this court cannot interfere. Hence, there is no substance in this petition and the same is required to be dismissed.

21.In result, this petition is dismissed.

(H.K. Rathod,J.)

Vyas